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7 **UNITED STATES DISTRICT COURT**
8 **NORTHERN DISTRICT OF CALIFORNIA**
9 **SAN FRANCISCO DIVISION**
10

11 UNITED STATES OF AMERICA,
12 Plaintiff,
13 v.
14 HENRY CERVANTES, et al.,
15 Defendants.
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Case No. 12-cr-00792-1 YGR (NC)

**SECOND DISCOVERY ORDER
RE: HENRY CERVANTES'S
MOTION FOR PRETRIAL
DISCOVERY TO AID IN THE
DEFENSE OF A DEATH-
ELIGIBLE DEFENDANT**

Re: Dkt. No. 95

17 On May 24, 2013, the Court issued its First Discovery Order granting in part Henry
18 Cervantes's Motion for Pretrial Discovery and imposing certain initial deadlines for the
19 government's production of Rule 16 discovery. On June 26, 2013, the Court held a further
20 discovery hearing to address the imposition of additional pretrial deadlines for the
21 government's disclosures. This order memorializes the Court's rulings at the hearing.

22 **A. Material to Be Produced**

23 **1. Forensic Science and Lab-Related Materials**

24 The Court previously imposed a deadline for the production of certain Rule 16
25 materials by August 6, 2013. At the hearing, the government stated that it has identified
26 five agencies (the "DNA Lab," the Oakland Police Department, the Oakland Fire
27 Department, the Alameda County Sheriff's Office Coroner's Bureau, and the Drug
28 Enforcement Administration) that might have documents in this category, and has provided

1 those agencies with the Court's First Discovery Order and the pertinent discovery requests.
2 The government further reported that it has already received and produced documents from
3 the "DNA Lab," which the defense characterized as very complete. According to the
4 government, the responses of the Oakland Police Department and the Oakland Fire
5 Department regarding the requested fingerprint analysis and arson investigation materials
6 are forthcoming. The Alameda County Sheriff's Office Coroner's Bureau has not produced
7 any documents to date, but has been informed of the production deadline. The government
8 reported that the Drug Enforcement Administration intends to object to the disclosure.

9 The Court orders that any objections to the Rule 16 disclosure of forensic science and
10 lab-related materials ordered produced by the Court must be filed by **July 10, 2013** (14 days
11 from the June 26 discovery hearing). Responses to the objections may be filed within 14
12 days of the objections. Any agency that files such objections must have its representative
13 appear at the next discovery hearing. The government must provide a copy of this order to
14 the agencies that have been served with outstanding document requests.

15 **2. Files Pertinent to Count 1 of the Superseding Indictment**

16 **a. U.S. Bureau of Prisons files**

17 At the hearing, the parties confirmed that Cervantes's medical records from the U.S.
18 Bureau of Prisons have been produced to the defense, and that, currently, no issues remain
19 with respect to this sub-category of documents.

20 Additionally, the government reported that Cervantes's BOP "central file" has been
21 produced, and that it contains most, if not all, of the documents sought by the defense. The
22 defense raised two issues regarding this production. First, the defense noted that it appears
23 that the production does not include documents showing the predicate findings for
24 Cervantes's special housing and administrative placement. The government responded that,
25 to the extent such documents exist, they have been produced, and that it is not aware of any
26 documents that are being withheld.

27 Second, the defense pointed that a minority of the documents produced contain
28 redactions. The government responded that there were only two types of information

1 redacted—references to weapon systems and other inmate names, and that the government
2 would oppose an attempt to remove those redactions.

3 The Court orders that by **July 26, 2013**, (1) the Bureau of Prisons must certify that it
4 has produced all documents in its possession, custody, or control called for under Rule 16,
5 and explain the reason(s) for the redactions; and (2) the parties, including the Bureau of
6 Prisons, to the extent it opposes the defense's requests for disclosure, must meet and confer
7 in an attempt to resolve any dispute regarding the redactions. If the parties agree that the
8 Court should resolve the redaction dispute by reviewing the documents ex parte in camera,
9 the government should submit the redactions and originals to chambers by **August 2, 2013**.

10 **b. California Department of Corrections and Rehabilitation files**

11 The defense stated that it has not been successful in seeking to obtain production from
12 the CDCR through negotiations, and that it intends to present a Rule 17 subpoena to the
13 District Court and provide a copy to the government. The Court continues this issue, and
14 will address the status of the Rule 17 subpoena proceedings at the further hearing, or sooner
15 if appropriate. Rule 17 issues have not been referred from the District Court.

16 **c. Files from the *U.S. v. Rubalcaba, et al.* case**

17 The government stated that it is approximately halfway through the process of
18 reviewing 18 boxes of discovery from the prior case *U.S. v. Rubalcaba, et al.*, No. 00-cr-
19 00654 CRB to determine which of the materials should be produced in this case. The Court
20 orders the parties to meet and confer by **July 26, 2013** regarding the process for production
21 of the documents. The materials must be produced by **August 26, 2013**, with the
22 expectation that, to the extent any documents become available for production earlier, the
23 government will produce them as soon as possible. The parties indicated that they have
24 begun discussions about a proposed protective order, which they will submit to the Court.

25 **3. Witness Statements**

26 With respect to the defense's request for cooperating witness statements, the
27 government objects to the production of such statements on the basis of witness safety
28 concerns. The government's position is that such statements fall under the category of

1 information not subject to disclosure under Rule 16(a)(2). The defense contends that these
2 are *Brady* materials. At the hearing, the defense explained that its primary concern is with
3 obtaining basic information about the circumstances of the homicides and the government's
4 allegations regarding Cervantes's involvement in drug transactions. The defense stated that
5 if the government provides this information in a narrative form, the defense will not, at this
6 time, seek the identity of cooperating government witnesses. The government responded
7 that it might not be possible to provide a narrative without revealing the identity of the
8 witness. The government further estimated that there are approximately 30 FBI 302 forms
9 comprising 7-8 witnesses, only one of which is a homicide witness. The Court orders the
10 government by **July 26, 2013** to make an ex parte submission under Rule 16(d) of (1) a
11 written statement summarizing any potential *Brady/Giglio* information; (2) the underlying
12 materials for the Court's in camera review; and (3) any evidence or arguments supporting
13 the non-disclosure of the summary or underlying materials.


14 **B. Further Hearing**

15 The parties informed the Court that Cervantes's pending severance motion and other
16 anticipated case developments are likely to affect the scope of the case and the timing of
17 discovery. The Court will hold a further hearing to discuss the status of the discovery and
18 set further disclosure deadlines on **August 14, 2013** at 11:00 a.m. The parties must submit
19 by **August 12, 2013** a joint report on the status of the discovery undertaken since the June
20 26, 2013 hearing and any outstanding discovery issues.

21 Any party may object to this non-dispositive order, but must do so within 14 days of
22 being served with the order. Failure to object waives a party's right to review. Fed. R.
23 Crim. P. 59(a).

24 IT IS SO ORDERED.

25 Date: June 28, 2013

26 
Nathanael M. Cousins
United States Magistrate Judge